No. 92-1307

In the Supreme Court of the United States

OCTOBER TERM, 1992

SELAIDAN BUILDERS, INC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF VERNON SAVINGS AND LOAN ASSOCIATION, F.S.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the FDIC was entitled to summary judgment on a promissory note.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 973 F.2d 1249. The order of the district court (Pet. App. 14-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1992. A petition for rehearing was denied on November 6, 1992. Pet. App. 23. The petition for a writ of certiorari was filed on February 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 24, 1985, Selaiden Builders, Inc. executed two promissory notes payable to Vernon Savings and Loan Association of Vernon, Texas (Old Vernon) for $509,800 and $433,000, respectively. Robert Selaiden, Charles Selaiden, and Jack McJunkin each executed unconditional guaranties on the two promissory notes; the Selaidens' guaranties covered the full amount owed on the notes, while McJunkin's guaranty was limited to 60% of the amounts owed on the notes. Selaiden Builders, Inc. defaulted on both promissory notes when they became due in April 1986. See Pet. App. 2-3.

On March 20, 1987, the Federal Home Loan Bank Board (FHLBB) declared Old Vernon insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) receiver for Old Vernon. Simultaneously, the FHLBB created a new savings and loan association, Vernon Savings and Loan Association, F.S.A. (Vernon FSA), and approved an acquisition agreement between FSLIC as receiver for Old Vernon and Vernon FSA, whereby Vernon FSA acquired substantially all the assets of Old Vernon. On the same day, the FHLBB appointed FSLIC receiver for Vernon FSA. Pet. App. 3.

2. FSLIC as receiver for Vernon FSA sued petitioners in the United States District Court for the Northern District of Texas to collect under the notes and guaranties executed in favor of Old Vernon. Pet. App. 3. The $509,800 note had been endorsed "Pay to the order of Federal Deposit Insurance Corporation as Manager of the FSLIC Resolution Fund as Receiver of Vernon Savings & Loan." See

Pet. App. 12. The $433,000 note had no endorsement. Petitioners asserted several affirmative defenses, as well as a counterclaim and a claim of offset based on an unrelated note that Jack McJunkin had purchased after suit had been brought. *Id.* at 3-4.

The Federal Deposit Insurance Corporation as receiver for Vernon FSA (FDIC-Receiver)[1] moved for summary judgment on the notes and guaranties and to sever petitioners' counterclaim and claim of offset. In support of the summary judgment motion, FDIC-Receiver attached affidavits from Robert St. John, an asset manager of FDIC-Receiver, and Wilma Howl, the custodian of records for FDIC-Receiver who had served in a similar capacity with each of the predecessor institutions of FDIC-Receiver—FSLIC as receiver for Vernon FSA, Vernon FSA itself, and Old Vernon. See Pet. App. 11 & n.12. The St. John affidavit stated, *inter alia*, that FDIC-Receiver owned the notes and guaranties and that they had been acquired from Old Vernon through Vernon FSA. C.A. Rec. Exc. Tab 7, at 13. The Howl affidavit stated that FDIC-Receiver "owned" the notes and guaranties and that they were previously "owned" by FSLIC as Receiver for Vernon FSA, Vernon FSA, and Old Vernon. *Id.* Tab 8, at 78.

Petitioners moved to strike the affidavits of St. John and Howl. The district court denied that motion. Pet. App. 17-18. After initially granting FDIC-

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[1] The FDIC succeeded FSLIC as receiver for Vernon FSA pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. See FIRREA §§ 401(a), 401(h), 12 U.S.C. 1437 note (Supp. III 1991).

Receiver's motion for summary judgment only in part, see *id.* at 16-19, the district court on reconsideration granted it in full, *id.* at 14-15. The court also severed petitioners' counterclaim and claim of offset. *Id.* at 17.

3. The court of appeals affirmed in part and reversed in part. With respect to the $509,800 note, the court held that there was a material issue of fact concerning whether FDIC-Receiver was the owner and holder of that note. The court observed that the endorsement referred to "Federal Deposit Insurance Corporation * * * as Receiver of Vernon Savings & Loan," while FDIC had brought suit in its capacity as Receiver of Vernon Savings & Loan Association, F.S.A. Presumably in light of the fact that both Vernon FSA and Old Vernon could be referred to as Vernon Savings and Loan, the court held that there was a genuine issue of material fact concerning the identity of the owner and holder of the note. Pet. App. 12-13.

The court of appeals affirmed the district court's grant of summary judgment with respect to the $433,000 note and guaranties. The court of appeals held that both St. John and Howl had sufficient personal knowledge by virtue of their positions to testify as to FDIC-Receiver's ownership status, Pet. App. 11-12 & n.12, and that petitioners "failed to produce or point to any summary judgment proof to establish their legitimate fear that the FDIC-Receiver is not the owner and holder of [the $433,000 note]," *id.* at 13.[2]

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[2] The court of appeals also affirmed the district court's decision to sever petitioners' counterclaim. Pet. App. 5-7.

ARGUMENT

1. Petitioners assert that FDIC-Receiver did not present sufficient proof of its ownership rights to recover under the $433,000 note and guaranties and that the court of appeals departed from settled precedent in affirming the district court's grant of summary judgment to FDIC-Receiver on the note and guaranties. Pet. 11-17.

In reviewing the sufficiency of FDIC-Receiver's evidence, the court of appeals applied settled law governing the grant of summary judgment. The court of appeals stated that "[s]ummary judgment is appropriate if the movant demonstrates that there is an absence of genuine issues of material fact" and that such a showing entitles the movant to judgment as a matter of law under Fed. R. Civ. P. 56(c). Pet. App. 8. The court further stated that the movant must "identify[] portions of the record which reveal that there are no genuine material fact issues" and that, to overcome the motion, the nonmoving party must come forward with "evidence in the record sufficient to establish that there is a genuine issue of material fact for trial." Pet. App. 8. Those standards are entirely in accord with this Court's decision in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-324 (1986), which was cited by the court of appeals (Pet. App. 8), and the invocation of those standards demonstrates that the court of appeals correctly understood the circumstances under which a party is entitled to summary judgment under Rule 56.

The court of appeals correctly applied the above standards to the facts of this case. The court determined that FDIC-Receiver met its initial

evidentiary burden through affidavits establishing its ownership of the $433,000 note and guaranties thereon. Pet. App. 13. Although petitioners assert (Pet. 6) that St. John's affidavit was insufficient because it was not based on his own personal knowledge, the court of appeals noted that his affidavit was based on his review of FDIC-Receiver's business records. Pet. App. 11 n.12. The court also explained that Howl had continuously held the post of custodian of records for Old Vernon and its successors since 1984, before the notes and guaranties were executed. *Ibid.* In light of those facts, the court found that the affidavit testimony constituted competent evidence that FDIC-Receiver was owner and holder of the note and guaranties. Pet. App. 12 n.12.

Since FDIC-Receiver had proffered competent evidence that it was owner and holder of the $433,000 note and guaranties, the burden shifted to petitioners to show that there was a material issue concerning whether FDIC-Receiver was owner or holder of the notes. Petitioners, however, were unable to meet that burden. Indeed, the court of appeals noted that they "failed to produce or point to any summary judgment proof to establish their legitimate fear that FDIC-Receiver is not the owner and holder" of the note and guaranties.[3] Pet. App. 13. Accordingly, the court of

[3] In addition to failing to designate any specific record evidence showing that there was a genuine issue as to FDIC-Receiver's ownership of the note and guaranties, petitioners failed to avail themselves of the opportunity to seek additional discovery under Fed. R. Civ. P. 56(f). Had petitioners held a legitimate concern that FDIC-Receiver did not own the obligations in its possession, they could have requested the opportunity under Rule 56(f) to pursue discovery on that issue.

appeals properly affirmed the district court's grant of summary judgment in favor of FDIC-Receiver.

2. Petitioners argue that the affidavit testimony of St. John and Howl was insufficient because it merely established that FDIC-Receiver was in possession of the note and guaranties, not that FDIC-Receiver was owner or holder of the note and guaranties. Pet. 16. See Pet. App. 9 (plaintiff must prove that it is owner or holder). Petitioners are mistaken. As explained above, there was competent affidavit testimony that FDIC-Receiver owned the note and guaranties. Such evidence, together with production of the instrument or a copy of it, has been held sufficient under Texas law to enforce a financial instrument against the maker. See, *e.g.*, *State Sav. & Loan Ass'n* v. *Liberty Trust Co.*, 863 F.2d 423, 425-426 (5th Cir. 1989); *Life Insurance Co.* v. *Gar-Dal, Inc.*, 570 S.W.2d 378, 381 (Tex. 1978) (bank officer's affidavit averring that the bank acquired the note and was the "sole owner and holder" of the note was sufficient summary judgment evidence); *Gotcher* v. *Lamar State Bank*, 714 S.W.2d 365, 370-371 (Tex. Ct. App. Beaumont 1986) ("The entire record * * * proves that the bank was the 'holder' in the sense that it had possession of the written instruments and produced them in court and proffered them into evidence."), writ ref'd, n.r.e. (Tex. 1987); *Alexander* v. *Houston Oil Field Material Co.*, 386 S.W.2d 540, 543-544 (Tex. Civ. App. Tyler) (ownership could be established by a "simple affidavit stating that [plaintiff] was the owner and holder of the note and by attaching thereto a sworn copy of the

note"), writ ref'd, n.r.e. (Tex. 1965); see also *Lloyd* v. *Lawrence*, 472 F.2d 313, 317 (5th Cir. 1973).[4]

Petitioners also argue that the Fifth Circuit has applied a more lenient summary judgment standard in cases involving the FDIC than in other civil actions, and they quote (Pet. 11) the court's statement that it sought "not to impose a standard so strict that summary judgment would be all but impossible for plaintiffs in cases such as these." Pet. App. 10. Since the court merely applied settled summary judgment principles, petitioners' assertion is mistaken. Moreover, the Fifth Circuit's reference to "cases such as these" no doubt was intended to refer back to its earlier comment that "suits on promissory notes provide fit grist for the summary judgment mill." *Id.* at 8 (quoting *FDIC* v. *Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1371 (5th Cir. 1988)). There is thus no basis for petitioners' claim that the Fifth Circuit engaged in inappropriate "policy-making on behalf of the FDIC." Pet. 17.

3. Although petitioners assert (Pet. 12) that the decision of the court of appeals creates a conflict among the circuits, the only case cited by petitioners

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[4] The cases cited by petitioners (Pet. 16) are not to the contrary. *Lawson* v. *Finance America Private Brands, Inc.*, 537 S.W.2d 483, 485 (Tex. Civ. App. El Paso 1976), and *Texas State Bank & Trust Co.* v. *St. John*, 103 S.W.2d 1104, 1108 (Tex. Civ. App. El Paso 1937), writ dismissed, w.o.j. (Tex.), establish at most that mere possession of a note is insufficient to entitle the possessor to enforce it. Neither case addresses the situation where, as here, the possessor of the note has introduced competent testimony that it was the owner of the note.

is *RTC* v. *Gill*, 960 F.2d 336 (3d Cir. 1992).[5] In *Gill*, the RTC as receiver of a failed thrift institution filed an interpleader action to determine which of three claimants—two private individuals and the IRS—owned certain funds that were in dispute. The court of appeals reversed a grant of summary judgment for the IRS on the ground that the IRS's affidavits entirely failed to address the legally dispositive issue —whether a notice of levy was served on the thrift institution just before or just after an account was closed. *Id.* at 341-342. That ruling has no bearing on the Fifth Circuit's holding in this case that FDIC-Receiver introduced evidence showing the absence of a material dispute concerning each element of its case.

[5] Petitioners also claim (Pet. 11-12) that the Fifth Circuit's decision in this case is in conflict with its own decision in *FDIC* v. *McCrary*, 977 F.2d 192 (5th Cir. 1992), and another, unpublished decision. Each of the cases cited by petitioner turned on its own facts, and we do not believe that the Fifth Circuit's decisions in this area are inconsistent. In any event, further review to resolve an intra-circuit conflict would be unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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